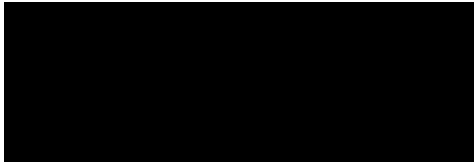




U.S. Citizenship
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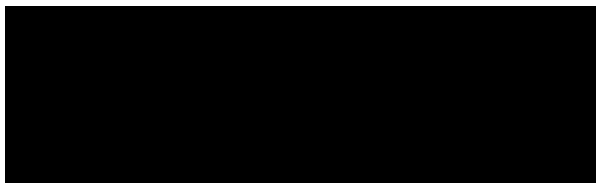
FILE: EAC-01-133-53683 Office: VERMONT SERVICE CENTER

Date: JUN 16 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]


PETITION: Immigrant Petition for Alien Worker or Professional Pursuant to Section 203(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, a subsequent motion was granted by the director, who sustained the prior decision to deny the petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be granted.

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a goldsmith. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage.

On motion to reopen and reconsider, counsel submitted a brief and additional evidence.

The director granted the motion sustaining the prior decision to deny the petition.

Regulations at 8 C.F.R. § 204.5(g)(2) state in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is October 25, 2000. The beneficiary's salary as stated on the labor certification is \$40,000.00 per year.

The director determined that with the initial petition, counsel, at the time, submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated August 16, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specified the petitioner's 2000 federal income tax return and evidence of wage payments to the beneficiary.

In response to the RFE, counsel submitted the petitioner's 2000 Form 1040, U.S. Individual Income Tax Return. The federal tax return for 2000 reflected adjusted gross income of \$39,735.00. Schedule C of the tax return reflected a net profit from business of \$41,564.00.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. In denying the petition, the director stated, in pertinent part, that:

The 2000 federal tax return that was submitted indicates an adjusted gross income of \$39,735.00. With consideration given to depreciation expenses the available income is \$56,575.00. However, when evaluating a sole proprietor's ability to pay the proffered wage, consideration must be given to all of the income and expenses generated by the sole proprietor and dependents. The sole proprietor must demonstrate that he or she can sustain themselves and their dependents at a level of

family of five based on the current poverty guidelines, the petitioner demonstrates an income available to pay the wage in the amount of \$35,905.00.

The record reflects that the director granted the petitioner's motion, but concluded that the petitioner had not met its burden of proof and sustained the prior decision to deny the petition. The director stated, in pertinent part, that:

The documentation submitted with your motion includes an affidavit in which it states that you have filed for an extension of time in the filing of the federal tax return for your business for the year 2001. It is further stated that you have the ability to pay the offered wage to the beneficiary. The other documentation submitted consists of a tax Form 1099 issued to the beneficiary for the year 2001 in which it shows a nonemployee [sic] compensation of \$34,830.00. . . It is further noted that no other conclusive financial documentation has been submitted to verify your ability to meet the offered wage as of October 25, 2000.

The record reflects that, on motion, counsel submits the petitioner's 2001 tax return, Form 1040 U.S. Individual Income Tax Return indicating an adjusted gross income of \$43,434.00 Schedule C of the tax return indicates a net profit of \$41,937.00. The record further reflects that this documentation was received by the service on August 14, 2002, 28 days prior to the director's dismissal of the motion. There is however, no evidence that the director considered such evidence in the rendering of his decision.

The priority date is October 25, 2000. Therefore, the petitioner must pay a prorated amount of the proffered wage, which is \$7,342.46 for the remainder of 2000. The record reflects that the petitioner had \$35,905.00 in available funds during 2000. Therefore, it is reasonable to conclude that the petitioner could pay the proffered wage during 2000 and cover his own expenses. The record further reveals that the petitioner paid the beneficiary \$34,830.00 during 2001. Thus, the petitioner is obligated to pay an additional \$5,170.00 to the beneficiary during 2001. The petitioner's 2001 Form 1040 for 2001 indicated an adjusted gross income of \$43,434.00. It is reasonable to conclude that the petitioner could pay the remainder of the proffered wage for 2001 from this amount and cover his own expenses. The petitioner has overcome the director's objections.

After a review of the evidence of record, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.